91-936

No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

PAUL A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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December 1991

QUESTIONS PRESENTED

A.

Whether the United States Court of Military Appeals erred by sanctioning a judicially crafted "military member—primary purpose" exception contrary to the unambiguous language both in 18 U.S.C. § 1385 ("Posse Comitatus Act") prohibiting the use of military members to execute civilian law and in 10 U.S.C. § 375 ("Regarding the Military Co-operation with Civilian Law Enforcement Officials") prohibiting the use of military personnel in civilian searches, arrests, or other similar civilian activity.

B.

Whether the search of petitioner's apartment by military law enforcement agents and the subsequent seizure of military property by those agents was illegal under the Fourth Amendment of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Paul A. Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 18, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 33 M.J. 218 (C.M.A. 1991) (Appendix B). The United States Air Force Court of Military Review issued a decision on February 16, 1990, reported at 30 M.J. 570 (A.F.C.M.R. 1990) (Appendix A).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 18, 1991. The jurisdic-

tion of this Court is invoked under Article 67a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a (Supp. 1989) and 28 U.S.C. § 1259(3) (Supp. 1989).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides in relevant part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . particularly describing the place to be searched and the persons or things to be seized.

18 U.S.C. § 1385, the "Posse Comitatus Act," states:

Section 1385. Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

10 U.S.C. § 375, "Regarding The Military Co-Operation With Civilian Law Enforcement Officials," states:

Section 375. Restriction ~~on~~ direct participation by military personnel. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct

participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, arrest, or other similar activity unless participation in such activity by such member is authorized by law.

32 C.F.R. § 213.10(a)(3) states:

(3) Restrictions on direct assistance. Except as otherwise provided in this enclosure, the prohibition on use of military personnel as a "posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:

(i) Interdiction of a vehicle, vessel, aircraft or other similar activity.

(ii) Search or seizure.

(iii) An arrest, stop and frisk, or similar activity.

(iv) Use of military personnel for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators.

32 C.F.R. § 213.10(a)(2)(i) states in part:

(2) Permissible direct assistance. The following activities are not restricted by the Posse Comitatus Act paragraph (a)(1) of this section, notwithstanding direct assistance to civilian law enforcement officials.

(i) Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities. This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include the following, depending on the nature of the DoD interest and the specific action in question:

(A) Actions relating to enforcement of the Uniform Code of Military Justice (10 U.S.C. Chapter 47).

* * * * *

(C) Actions related to the commander's inherent authority to maintain law and order on a military installation or facility.

(D) Protection of classified military information or equipment.

(E) Protection of DoD personnel, DoD equipment, and official guests of the Department of Defense.

(F) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

28 C.F.R. § 60.1 states in relevant part:

. . . Further, in all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney's Office before seeking a search warrant.

STATEMENT OF THE CASE

On January 10, 11, and February 1, 2, 3, 1989, the petitioner, an Air Force senior airman (E-4), was tried by a general court-martial composed of officer military jurors at Lackland Air Force Base, Texas. He pled not guilty to charges of larceny, unauthorized disposition of military property, arson and burglary, violations of UCMJ Articles 121, 108, 126, and 130, [10 U.S.C. §§ 921, 908, 926, 130] respectively. He was convicted despite his pleas and sentenced to a dishonorable discharge, confinement for 10 years, total forfeiture of all pay and allowances and reduction to airman basic (E-1). The Air Force Court of Military Review affirmed the findings and sentence on February 16, 1990. The United States Court of Military Appeals affirmed the findings and sentence on September 18, 1991.

The genesis of the case against the petitioner occurred sometime prior to October 26, 1988 when Air Force Office of Special Investigation (AFOSI) Special Agents (SA) were

told they had insufficient information for a search warrant to search the petitioner's apartment, despite their suspicion that the petitioner was involved in the larceny of computer equipment from Wilford Hall Medical Center, Texas, and the larceny and arson of a civilian Atari Computer store. On October 26, 1988, SA Adams and SA Forsch went to appellant's off-base apartment to try to purchase some of the stolen property, and in any event, to apprehend the appellant. While inside the apartment, no military property was visible, but the agents noticed Atari equipment fitting the general description of equipment missing from the civilian Atari store. After an electronic signal from SA Adams, another OSI agent came to the door and apprehended the appellant.

SA Adams' and SA Forschs' "plain view" observations were communicated to an investigator from the San Antonio Police Department (hereinafter SAPD) and were used by him as the basis for a civilian search warrant issued by a civilian magistrate to search the apartment for specified computer equipment missing from the civilian Atari Computer store. The only items specified in the warrant were those missing from the civilian store. No mention was made to the magistrate that the apartment may also contain stolen military property. No mention of military property was made in the warrant. The civilian warrant was executed on October 26 by four AFOSI agents and thre SAPD officers.

At trial, defense counsel moved for the exclusion of all evidence seized by the SAPD and the AFOSI during the October 26, 1988 search of appellant's apartment based on the AFOSI agents' violation of 18 U.S.C. § 1385, known as the Posse Comitatus Act (hereinafter P.C.A.), 19 U.S.C. § 375 and 32 C.F.R. § 213.10 (1982). The P.C.A.

prohibits the use of the military as a posse comitatus[1] or to execute the nation's laws. A later statute passed by Congress in 1981, P.L. 97-86, titled "Regarding The Military Cooperation With Civilian Law Enforcement Officials," (codified at 19 U.S.C. §§ 371-378) clarified the scope of military activities judicially permited under the P.C.A. yet not addressed by earlier statutory exemptions.[2] H.R. Rep. No. 97-71, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1785, 1790 (hereinafter 1981 Cong. News.).[3] This later statute specifically prohibited, in 10 U.S.C. § 375, the direct participation of military members in civilian searches, arrests, or other "similar activity." In 1982, the Secretary of Defense promulgated 32 C.F.R. §§ 213.1-213.11 (1982) (titled DOD Co-operation with Civilian Law Enforcement Officials"). Section 213.10(a)(3) of this regulation specifically deals with restrictions on the participation of DoD personnel in civilian law enforcement activities, including prohibiting the use of military personnel in civilian searches and seizures.

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[1] Posse Comitatus, literally "power or force of the country," was defined at common law as those over 15 years of age whom a sheriff could call for aid in preventing civil disorder or for the pursuit of felons. H.R. Rep. No. 97-71, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1785. *See also*, Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 87 (1960) (hereinafter Furman).

[2] The provisions of 10 U.S.C. § 374 permit the use of military personnel to maintain sophisticated military equipment made available under 10 U.S.C. § 372 in drug, immigration and some tariff cases. In 10 U.S.C. § 372, Congress authorized the Secretary of Defense to make available any "equipment, base facility, or research facility" of any military department to any Federal, State or local law enforcement official for law enforcement purposes.

[3] For a collection of prior statutory exemptions to the P.C.A. *see supra* 1981 Cong. News at 1789.

Defense counsel asserted at appellant's trial that the four AFOSI agents who entered into the appellant's apartment on October 26, 1988 did nothing less then execute a civilian (Texas) search warrant in direct contravention of the P.C.A., 10 U.S.C. § 375 and 32 C.F.R. § 213.10. Trial counsel specifically agreed in a stipulation of fact that the four AFOSI agents jointly executed the civilian search warrant with three members of the SAPD. Nevertheless, trial counsel, in response to defense counsel's suppression motion, asserted *inter-alia* that the P.C.A. was not violated because the appellant was "a military member, not a civilian person for which the act was designed to protect."

The trial judge denied the defense motion to suppress based on violations of the P.C.A, 10 U.S.C. § 375, and 32 C.F.R. § 213.10, and his ruling was upheld by the Air Force Court of Military Review. *United States v. Thompson*, 30 M.J. 570, 574 (A.F.C.M.R. 1990). The Air Force Court of Review examined the history of the P.C.A., 10 U.S.C. 375, including the pertinent 1981 revisions to Title 10 of the United States Code, and 32 C.F.R. § 213.10. In essence, although the Air Force Court of Military Review recognized that the prohibitions in 10 U.S.C. 375 against direct participation by military members in a search and seizure, an arrest, or other similar activity was reflected in 32 C.F.R. § 213.10(a)(3)(ii), the lower Court nonetheless found that these prohibitions were subsumed and thus permitted by 32 C.F.R. § 213.10(a)(2)(i). Accordingly, the Air Force Court of Military Review held neither the P.C.A. nor 10 U.S.C. § 375 was applicable to military agents assisting civilian police in "the execution of a warrant in the course of a joint investigation of a military member for the theft of both private and military property" whose "primary purpose" was the enforcement of the

UCMJ and recovery of stolen property." *Thompson, supra* at 574.

The United States Court of Military Appeals also upheld the trial judge's denial of the defense motion to suppress. *Thomas*, 33 M.J. at 221 (C.M.A. 1991). The Court of Military Appeals found that the "primary purpose" of the AFOSI involvement was to enforce the UCMJ, and that this was evidenced by the fact that the agents were involved in their own investigation of both on-base and off-base thefts. *Id.* Although the Court of Military Appeals admitted that the "civilian warrant was for seizure of civilian property and that it was obtained by civilian agents for that purpose," it observed, citing *Solorio v. United States*, 483 U.S. 435 (1987), that the military had concurrent jurisdiction over the civilian crimes and thus it was "entirely logical" for the military agents to accompany the civilian police when "the latter" executed the civilian search warrant. *Id.* The Court of Military Appeals also rejected the petitioner's claim that the AFOSI used their joint search with the civilian police to evade the Fourth Amendment barrier to the agents entering the apartment due to their lack of probable cause. The court found that the military agents were lawfully on the petitioner's premises and that they were engaged in a good faith search for the civilian property listed on the warrant, property over which there was concurrent jurisdiction and in which there was mutual interest. *Id.* at 222.

REASONS FOR GRANTING THE WRIT

By overruling the defense objection, and creating a "military member-primary purpose exception" to, and allowing in evidence seized in violation of, the P.C.A., 10 U.S.C. § 375, and 32 C.F.R. § 213.10, the lower courts of

review violated both the clear meaning of, and the congressional intent behind, these statutes and the regulation. The holdings also misread this Court's holding in *Solorio, supra*, and rendered superfluous 28 C.F.R. § 60.1 (1983).

"[T]he starting point in every case involving construction of a statute is the language itself." *San Francisco Arts and Athletics v. U.S.O.C.*, 483 U.S. 522, 528 (1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986)). By its clear language, 10 U.S.C. § 385 does not permit the participation by a military member in a civilian "search, arrest, or other similar activity," and the lower courts of review should have "assumed that the legislative purpose [was] expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Not only is this aforementioned statutory language conclusive, legislative history belies any congressional intent which would have permitted such a judicially created exception to this statutory prohibition. Indeed, the Congressional Report accompanying the bill which was to become 10 U.S.C. § 375 stated that the bill's allowance of the occasional use of military personnel to operate sophisticated equipment on loan to civilian drug enforcement agencies represented but a "slight and narrow departure" from the principles of the P.C.A., 1981 Cong. News at 1790, and that even this was "to be construed narrowly." *Id.* at 1794.[4] Moreover, the Judicial Committee emphasized that

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[4] The House Committee on the Judiciary, in commenting on this narrow departure, noted *inter alia* that *United States v. Red Feather*, 392 F. Supp. 916 (D.S.D. 1975), *aff'd sub nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977) held that the proscriptions in the P.C.A. applied to direct active use of manpower and not to the use of equipment or material. 1981

the prohibitions in 10 U.S.C. § 375 against the direct participation by military members in searches, seizures, arrests, or similar activity "reaffirmed the traditionally strong American antipathy towards the use of the military in the execution of civil law," and quoted with approval the following remarks of Senator Hill, one of the sponsors of the P.C.A.:

> [W]henever you conclude that it is right to use the Army to execute Civil process . . . it is no longer a government founded upon the consent of the people; it has become a government of force. 7 Cong. Rec. 4245-4247 (1878) (remarks of Senator Hill).

1981 Cong. News *supra* at 1793 (ellipsis in original).

Similarly, the strong congressional antipathy against military execution of civilian laws by way of involvement in civilian searches, seizures, and arrests continued to be expressed in subsequent modifications to 10 U.S.C. § 375.[5] In 1988, the Joint Conference Committee, in the House Conference Report No. 100-989 on the National Defense Authorization Act for Fiscal Year 1989, noted:

> The conferees recognize that the magnitude of the drug problem has led to calls for the military to be directly involved in search, seizures and arrests. The conferees, however, do not believe that it is ap-

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Cong. News, *supra* at 1788. *See also*, Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83, 123 (1975).

[5] The 1988 Amendment to 10 U.S.C. § 375 deleted the term "interdiction of a vessel or aircraft" from the original section 375 to allow the military to "detect and monitor" vessels and aircraft, since the term "interdiction" had acquired those meanings in addition to meaning "physical interference" which was solely intended in the original statute. H.R. Conf. Rep. No. 100-989, 100th Cong., 2nd Sess. 452, *reprinted in* 1988 U.S. Code Cong. & Ad. News 2503, 2580.

> propriate to make such a radical break with the historic separation between military and civilian functions without clear and compelling evidence that such an action would result in a substantial reduction in the drug problem. The overwhelming weight of the evidence is that no such change would come from giving the military police powers.

H.R. Conf. Rep. No. 100-989, 100th Cong., 2nd Ses. 452, *reprinted in* 1988 U.S. Code Cong. & Ad. News 2503, 2580 (hereinafter 1988 Cong. News.)

The Committee also cited, in support of their refusal to relax the prohibitions found in the P.C.A. and 10 U.S.C. 375, the testimony of then Secretary of Defense Carlucci:

> I remain absolutely opposed to the assignment of a law enforcement mission to the Department of Defense. I am even more firmly opposed to any relaxation of the posse comitatus restrictions on the use of the military to search, seize and arrest. I have discussed this matter with the President, and other senior members of his Cabinet, and I can report that these views are shared throughout this Administration. The historical tradition which separates military and civilian authorities in this country has served both to protect the civil liberties of our citizens and to keep our Armed Forces military focused and at a high state of readiness.

1988 Cong. News at 2581-2582.

The courts of review's reliance on *Solario, supra*, in order to justify their "primary purpose – military member" exception to the prohibitions against the use of military members to execute civil law is also misplaced. Their reasoning confuses the concept of whether a member is subject to the *jurisdiction* of a military court-martial with whether the military is exempted from the prohibitions

against using the military as posse comitatus or to execute civil law and participate in civilian searches or arrests merely due to the status of the particular United States citizens against whom the civil law(s) are being executed. The fact that a military member is subject to the jurisdiction of a military court-martial for violations of the UCMJ committed whether or not the member is off duty, off-base, or out of uniform, *see Solario, supra*, does not create an exception to the aforementioned prohibitions. As one commentator noted:

> In practice, "to execute the laws" has been construed to mean the execution of the civil laws, that is, the laws enacted by the Federal, State, or local governments for the [government] of the community as a whole, without regard to the military or civilian status of the individual members thereof. This principle has been sometimes stated in terms of enforcement of laws against civilians. This is believed to be inaccurate, however, the [Posse Comitatus] Act makes no mention of the persons against whom the laws are executed but merely prohibits the employment of the Army to execute the laws. Thus it is the character of the laws executed and not the person against whom they are enforced which is important.

Furman, *supra*, at 104. Accordingly, the appellant was subject to civilian authority in the form of a civilian (Texas) search warrant, and the use of military members to execute and enforce this authority constituted a violation of the P.C.A. and 10 U.S.C. § 375. *See, e.g., State v. Trueblood*, 46 N.C. App. 541, 265 S.E.2d 662 (Actions of military agents, rather than military status of active duty officer being investigated, analyzed by court to determine if a P.C.A. violation occurred).

Additionally, the lower courts misread 32 C.F.R. § 213.10(a)(2)(i) as authorizing a military member exception to the P.C.A. and 10 U.S.C. § 375. 32 C.F.R. § 213.10 was promulgated under the statutory authority of 10 U.S.C. §§ 371-378. Consequently, the permissible direct military assistance to civilian law enforcement officers regulatorily authorized by 32 C.F.R. § 213.10(a)(2)(i) is necessarily limited by the statutory prohibitions found in 10 U.S.C. §§ 371-378. *See, Public Employees v. Betts*, 492 U.S. 151, 158 (1989) (No deference is due to agency interpretations of statute at odds with the plain language of the statute itself). Nothing permitted under 32 C.F.R. §213.10(a)(2)(i) creates a military exception to the P.C.A.'s or 10 U.S.C. § 375's prohibition against military members participating in civilian searches and seizures. Instead, the permitted activities under that regulation merely reflect those activities allowed, judicially or by statutory exemption, under the P.C.A. and 10 U.S.C. §§ 371-378.[6] If Congress wanted to create a "military member – primary purpose" exception to the P.C.A. and 10 U.S.C. § 375 prohibitions against the military executing civil law, they were free to do so by statutory exemption, as they did in 42 U.S.C. § 1989, when they allowed the military execution of certain warrants relating to the enforcement of specified civil rights laws. In the absence of a statutory exemption, however, the lower courts of review are not free to fashion one themselves.

Finally, the lower courts' opinions rendered superfluous 28 C.F.R. §§ 60.1 (1983), which mandates that "in all instances, military agents of the Department

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[6] *Compare* 32 C.F.R. § 213.10(a)(2)(i) *with* Meeks, *supra*, at 124-128 *and* 32 C.F.R. § 213.10(a)(2)(i) *with* 1981 Cong. News, *supra*, at 1789.

of Defense must obtain the concurrence of the appropriate U.S. Attorney's Office before seeking a search warrant from a federal magistrate[7] or state court judge under Fed. R. Crim. P. 41(h). As in the case at bar, AFOSI agents would merely have to execute civilian search warrants obtained by civilian authorities at their behest to avoid the clear and unqualified requirements of 28 C.F.R. 60.1 and Fed. R. Crim. P. 41(h).[8]

The Court of Military Appeals' rejection of the petitioner's Fourth Amendment objection is based in part on the erroneous view, discussed *supra*, that the P.C.A. was not violated by the military agents. *Thompson, supra* at 222. As noted *supra*, the military agents were told they did not have sufficient information for a search warrant for military property to issue. Nevertheless, while executing the civilian search warrant, no military agent was briefed as to the specific civilian computer equipment listed on the warrant. Instead, military agents specifically sought, then seized, the military property introduced into evidence in

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[7] At trial, defense counsel pointed out that U.S. Magistrates were available in San Antonio who could have been approached by military agents should they have desired the issuance of a search warrant.

[8] Contrary to the Court of Appeals' characterization that the military agents merely accompanied the civilian police "when the latter executed the civilian search warrant," *Thompson*, 33 M.J. at 221, the prosecutor at trial stipulated, and the trial judge made a finding of fact, that the four military agents *jointly executed* the civilian search warrant with the three members of the SAPD. In fact, the Air Force Court of Military Review observed that for purposes of the defense motions to suppress, the prosecution had "conceded that the AFOSI agents actively participated in the execution of the civilian search warrant." *Thompson*, 30 M.J. at 572, n.3. *See State v. Danko*, 219 Kan. 490, 558 P.2d 819 (1976) and *Taylor v. State*, 645 P.2d 522 (Okl. Crim. App. 1982) for two cases in which a joint search by civilian and military agents were found to violate the P.C.A.'s prohibition against the use of military personnel to execute civil law.

this case. The search was, in effect, an independent search for property which violated the basic constitutional requirement that police, in the absence of exigent circumstances, may not enter a citizen's private residence and make warrantless searches and seizures of objects despite the fact that the police may have the fullest measure of probable cause that the object to be seized is incriminating or even contraband. *See e.g., Horton v. California*, 495 U.S. ____, 110 L. Ed. 2d 112, 123 at n.7 (1990); *Payton v. New York*, 445 U.S. 673 (1980); *United States v. Agnello*, 269 U.S. 20 (1925). The Fourth Amendment rights of the appellant were also violated because the military agents did not have lawful access under the P.C.A. to the appellant's apartment, and they thus did not legally seize the property under the plain view doctrine. *Horton, supra*, at 123. The military property should, therefore, have been suppressed as fruits of an illegal search and seizure under the Fourth Amendment.

CONCLUSION

The petitioner's case is a worthy one for this Court to review. The lower courts of review's judicially crafted exception to the aforementioned federal laws is prohibited by the clear language of and the legislative intent behind the statutes, and their opinions effectively condone their transgression. ". . . [U]nder our Constitution, no court, state or federal, may serve as an accomplice in the willful transgression of the 'Laws of the United States,' laws by which 'the Judges in every State [are] bound.' " *Lee v. Florida*, 392 U.S. 378, 385-86 (1968). Additionally, the reception of the fruits of the illegal search into evidence violated the petitioner's Fourth Amendment rights. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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December 1991

APPENDIX A

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27675

UNITED STATES

v.

SENIOR AIRMAN PAUL A. THOMPSON, FR 427-31-6836,
UNITED STATES AIR FORCE

Sentence Adjudged 3 Feb. 1989.
Decided 16 Feb. 1990.

Accused, senior airman, United States Air Force, was convicted by general court-martial, Mark A. Breidenbach and Stark O. Sanders, JJ., of larceny, wrongful sale of military property, arson, and housebreaking. The United States Air Force Court of Military Review, Pratt, J., held that: (1) agents of Air Force Office of Special Investigations (AFOSI) could assist local police authorities in executig civilian search warrant in course of joint investigation of accused for theft of private and military property; (2) addition of military agents to search team did not, in and of itself, represent any significant additional intrusion upon privacy rights protected by Fourth Amendment; and (3) accused did not preserve challenge to alleged, plain view seizure of military property.

Affirmed.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Mark R. Land.

Appellate Counsel for the United States: Colonel Joe R. Lamport and Captain Morris D. Davis.

Before HODGSON, SPILLMAN and PRATT, Appellate Military Judges.

DECISION

PRATT, Judge:

Arising out of a joint military/civilian investigation and ensuing search, this case presents issues concerning the application of the Posse Comitatus Act and related statutory restrictions, as well as "plain view" issues and their preservation for appeal. As discussed hereinafter, we find no error and affirm.

Contrary to his pleas, appellant was found guilty by a general court-martial composed of members of two specifications of larceny, wrongful sale of military property, arson, and house-breaking.[1] He was sentenced to a dishonorable discharge, confinement for 10 years, total forfeitures and reduction to airman basic. The convening authority approved the sentence as adjudged.

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[1] Specification 1 of Charge I alleged a larceny of military property, the same military property which is the subject of Charge II alleging wrongful sale of military property. However, when instructing the members as to the elements of the offense of that larceny, the trial judge neglected to include the element relating to the nature of the property as "military property." Fortunately, in determining the maximum punishment for the offenses of which the appellant was convicted, the judge used the lesser confinement period applicable to larceny of non-military property. Upon the proper advice of his staff judge advocate, the convening authority corrected the error by approving a finding of guilty of larceny, excepting the word "military".

On appeal, the following issue has been raised:

> WHETHER THE SEARCH OF APPELLANT'S APARTMENT BY AFOSI AGENTS AND THE SUBSEQUENT SEIZURE OF MILITARY PROPERTY BY THOSE AGENTS WAS ILLEGAL UNDER 10 U.S.C. 375 AND THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Appellant was a suspect in the theft of computer equipment from Wilford Hall Medical Center and the burglary/arson of an Atari computer store in the civilian community. As a result, agents of the Air Force Office of Special Investigations (AFOSI) and local arson detectives embarked on a cooperative effort to investigate appellant for these offenses. On 20 October 1988, Agent Adams, an AFOSI agent acting in an undercover role, went to an informant's residence where appellant sold him several pieces of computer equipment suspected to be items missing from Wilford Hall.

On 26 October, Agent Adams and an AFOSI computer specialist, Agent Forche, again acting in an undercover capacity, arranged to meet appellant at his residence for the purpose of possibly buying additional equipment. Their plan was to observe any other stolen computer equipment in appellant's residence, to possibly make another "buy" of such equipment, and to signal other agents at the appropriate time to apprehend appellant. Although no purchase took place on that occasion, Agent Adams did activate an electronic device which signalled a third AFOSI agent to come to the door and apprehend appellant, which he did.[2] At that time, appellant requested

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[2] One of the motions to suppress at trial asserted that this scenario constituted both a warrantless search and a warrantless apprehension. Although not raised on appeal, we note our rejection of this conten-

counsel and declined to grant consent for a search of his residence.

Immediately after appellant's apprehension, Agents Adams and Forche briefed a local arson detective on the various items of computer equipment which they had observed in appellant's residence and which matched the description of equipment missing from the Atari computer store. Based on this information, the arson detective secured a search warrant from a municipal court magistrate. The warrant was executed that same evening by three members of the local police department and four AFOSI agents.[3] The local police seized various items of computer equipment associated with the Atari store as well as several "tools" believed to have been used to effect the burglary. The AFOSI agents, in the course of their participation in the search, came across and seized some computer equipment and various other items believed to be government property.

Violation of 10 U.S.C.

At trial, through four separate motions to suppress, defense counsel waged a multifaceted attack on the admissibility of the evidence seized both by the civilian

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tion. *See Lewis v. United States,* 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *United States v. Ruiz-Altschiller,* 694 F.2d 1104 (8th Cir. 1982); *United States v. White,* 660 F.2d 1178 (7th Cir. 1981); *State v. Cantrell,* 426 So.2d 1035 (Fla.App. 1983); *see generally* 3 LaFave *Search and Seizure,* sec. 8.2(m) at 221-228 (1987) and 2 LaFave *Search and Seizure,* sec. 6.1(c) at 581-585 (1987).

[3] A stipulation of fact, entered into explicitly for the purpose of establishing the facts applicable to the defense motions to suppress the fruits of the search, plainly states that both the local police *and* the AFOSI agents executed the warrant. Thus, the government conceded that the AFOSI agents actively participated in the execution of the civilian search warrant.

detectives and by the AFOSI agents. One such motion, renewed now on appeal, charged that participation by the AFOSI agents in the execution of the civilian searc warrant constituted a violation of 18 U.S.C. § 1385 (commonly known as the Posse Comitatus Act) and of 10 U.S.C. § 375.

The Posse Comitatus Act, first enacted in 1878 as a result of Reconstruction politics, was intended to halt the use of military forces in aid of civil law enforcement officials. Prior to its enactment, the use of military troops had become a common method of assisting civilian officials in suppressing illegal whiskey production, quelling labor disturbances, and insuring the sanctity of the electoral process in the South by posting guards at polling places.[4] In its present day form, as 18 U.S.C. § 1385, the Act reads:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000.00 or imprisoned not more than two years, or both.

For years truly an "obscure and all-but-forgotten statute,"[5] the Posse Comitatus Act has occasioned renewed, if sporadic, interest in the both federal and state courts in the past 20 years. *See United States v. Bacon,* 851 F.2d 1312 (11th Cir. 1988); *United States v. Griley,* 814 F.2d 967 (4th Cir. 1987); *United States v. Chaparro-Almeida,* 679 F.2d 423 (5th Cir. 1982); *United States v. Wolffs,* 594 F.2d 77 (1979); *United States v. Walden,* 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983, 94 S.Ct.

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[4] *See* Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act,* 70 Mil.L.Rev. 83, 90 (1975).

[5] *Chandler v. United States,* 171 F.2d 921, 936 (1st Cir. 1948).

2385, 40 L.Ed.2d 760 (1974); *United States v. Cotton,* 471 F.2d 744 (9th Cir. 1973); *United States v. Red Feather,* 392 F.Supp. 916 (D.S.D. 1975); *United States v. Jaramillo,* 380 F.Supp. 1375 (D.Neb. 1974); *Moon v. Alaska,* 785 P.2d 45 (Alaska App. 1990); *People v. Burden,* 411 Mich. 56, 303 N.W.2d 444 (1981); *Hildebrandt v. State,* 507 P.2d 1323 (Okla.Crim.App. 1973); *Hubert v. State,* 504 P.2d 1245 (Okla.Crim.App. 1972). For the most part, however, as the need for increased cooperation between military and civilian law enforcement authorities rose steadily, military and civilian officials were left to interpret the Act and its parameters without a great deal of guidance. The proper application of that aging statute to modern-day circumstances became a matter cloaked in considerable ambiguity.

Recognizing this problem, and spurred mainly by the belief that law enforcement cooperation was critical to effectively combatting the "rising tide of drugs" being smuggled into the United States, Congress attempted to clarify the intent of the Posse Comitatus Act through the enactment of a new Chapter in Title 10 of the United States Code[6] – Chapter 18, Military Cooperation with Civilian Law Enforcement Officials, consisting of 10 U.S.C. sections 871-878. This Chapter addressed various aspects of such cooperation and, with minor exception, simply codified then-existing interpretations of the Act. The National Defense Authorization Act, Fiscal Year 1989 (P.L. 100-456, Sept. 29, 1988), amended those provisions to authorize an even greater degree of cooperation as a reflection of the escalating "war" against drugs[7]. As presently written, 10 U.S.C. § 375 provides:

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[7] *See* 1981 U.S.Code Cong. and Adm.News, p. 1781, 1785.

[7] Changes to 10 U.S.C. § 375 did not involve or affect that part of the provision pertinent to the issue presently before this Court.

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any support . . . to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a *search and seizure,* an arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

(Emphasis added.) In compliance with the direction contained above, the Secretary of Defense issued appropriate regulations in Title 32, Part 213 of the Code of Federal Regulations (CFR).[8] The prohibition against direct participation in a search or seizure is duly included at 32 C.F.R. 213.10(a)(8)(ii) in a section addressing restrictions on direct assistance to civilian law enforcement officials. However, in the immediately preceding section, *permissible* direct assistance is addressed:

> The following activities are *not* restricted by the Posse Comitatus Act . . . *notwithstanding direct assistance to civilian law enforcement officials.*
>
> (i) Actions that are taken for the *primary purpose of furthering a military* or foreign affairs *function of the United States, regardless of incidental benefits to civilian authorities* . . . Actions under this provision may include the following, depending on the nature of the DoD interest and the specific action in question:
>
> (A) Actions related to *enforcement of the Uniform Code of Military Justice* (10 U.S.C. Chapter 47).
>
> * * * * *

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[8] 32 C.F.R. 213.1-213.11.

(E) Protection of DoD personnel, *DoD equipment,* and official guests of the Department of Defense.

(F) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

32 C.F.R. 213.10(a)(2) (Emphasis added). Our review of the statutes in issue, their legislative history, and the available case law convinces us that the CFR provision quoted above constitutes an accurate interpretation of the statutory prohibitions and contains the key to their proper application, i.e., that the prohibitions contained in the Posse Comitatus Act and in 10 U.S.C. § 375 do not now, nor were they ever intended to, limit military activities whose *primary purpose* is the furtherance of a military (or foreign affairs) function, regardless of benefits which may incidentally accrue to civilian law enforcement. Clearly, and as specifically recognized in the CFR provision, enforcement of the UCMJ is one such function and the protection of DoD equipment is another.[9]

Applying these principles to the case at hand, we find that neither the Posse Comitatus Act nor 10 U.S.C. § 375

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[9] Stated another way, it is clear from the legislative history of these statutes that their purpose was to preclude the imposition of military force on the civilian citizenry as a means of enforcing civil law. Military personnel, already subject to military authority, were certainly never envisioned as the primary beneficiaries of those prohibitions. For many years, while the military's jurisdiction over offenses committed by military members was limited to those evincing a distinct "service connection," military personnel did arguably enjoy the protections of the Posse Comitatus Act as to offenses which were beyond the judicial grasp of the military justice system. Even those cases, however, often posed a troublesome "posse comitatus" problem when the military, although without criminal jurisdiction, had significant interest and responsibility in responding to misconduct through various administrative processes.

has application to the actions of the AFOSI agents who, in assisting local police authorities in the execution of a civilian search warrant in the course of a joint investigation of a military member for the theft of both private and military property, had as their primary purpose the enforcement of the UCMJ and the recovery of stolen military property. Although the search warrant was grounded on the presence of stolen non-military proeprty, the military had concurrent jurisdiction over that underlying offense and exclusive jurisdiction over the suspected theft of military property, the presence of which in appellant's house was a reasonably foreseeable possibility.

While other issues attend the search and seizure, as discussed below, we find no violation of the Posse Comitatus Act or 10 U.S.C. § 375.[10]

Fourth Amendment

As the second prong of the assigned error, appellate defense counsel contend that the AFOSI agents, instead of assisting in the execution of the civilian search warrant, actually conducted a completely independent search for military property. As appellate defense counsel assert, correctly we believe, there is a distinct difference between (1) evidence obtained as a result of "plain view" during the course of a lawful search and (2) evidence obtained as a

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[10] Even if we were to find that the participation by AFOSI agents in the execution of the search warrant constituted a violation of the Posse Comitatus Act and/or 10 U.S.C. § 375, we would nevertheless reject appellant's suggestion that exclusion of the evidence is the appropriate remedy. *See United States v. Bacon,* 851 F.2d 1312 (11th Cir. 1988); *United States v. Griley,* 814 F.2d 967 (4th Cir. 1987); *United States v. Hartley,* 796 F.2d 112 (5th Cir. 1986); *United States v. Walden,* 490 F.2d 372 (4th Cir.), *cert. denied,* 416 U.S. 983, 94 S.Ct. 2385, 40 L.Ed.2d 760 (1974).

result of an active independent search for items not listed in the search warrant.

Inherent in our conclusion as to the first prong of the assigned error, we believe that the AFOSI agents could properly be invited by their civilian counterparts to accompany them during execution of the search warrant. *United States v. Washington,* 782 F.2d 807 (9th Cir. 1986); *United States v. Wright,* 667 F.2d 793 (9th Cir. 1982). As noted above, we see no "posse comitatus" problem and, from a Fourth Amendment standpoint, appellant's privacy interests had already been effectively dissolved by the duly issued search warrant; the addition of AFOSI agents to the search "team" did not, in and of itself, represent any significant additional intrusion upon appellant's privacy. Further, our review of the circumstances convinces us that the civilian search was a serious investigative action conducted in good faith and not simply a "subterfuge" or "pretext" search fabricated to mask the AFOSI agents' lack of probable cause to search for military property. *See United States v. Washington, supra; United States v. Johnson,* 707 F.2d 317 (8th Cir. 1983); *United States v. Hare,* 589 F.2d 1291 (6th Cir. 1979). However, in joining the search "team", the AFOSI agents were subject to the same restrictions and constraints which governed the civilian officers in executing the search. Thus, while the AFOSI agents could properly accompany the civilian detectives and seize items under the "plain view" doctrine, *see Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), they did not have authority to conduct an independent search for items outside the scope of the warrant, i.e., military property.

The issue that presents itself, then, is whether the items of military property seized by the AFOSI agents during the execution of the civilian search warrant were the result of

legitimate "plain view" or, instead, the result of an improper independent search.

However, before this Court can consider the merits of this issue, as framed by appellate defense counsel, we must first determine whether this issue was raised at the trial below and, thereby, preserved for consideration on appeal. If it was not raised below, it has been waived. R.C.M. 905(e).

Of the several written motions to suppress submitted by the defense counsel at trial, one such motion (Appellate Exhibit IX) comes close to the issue at hand. By its own terms, that motion sought to suppress:

> all evidence seized by the Officers of the SAPD [San Antonio Police Department] and the AFOSI which were not specifically listed on the Bexar County, Texas search warrant or within the plain view of the officers *while they stood in the front room area of the apartment* and for which they had probable cause to believe was evidence of a crime or was contraband.

(Emphasis added.) After a "FACTS" section recounting applicable facts on the motion, defense counsel further explained the basis for the motion in a section entitled "ARGUMENTS AND AUTHORITY":

> The warrant issued by the Bexar County, Texas magistrate limited the scope of the search to be conducted to the specific items listed on the warrant. This information came from two AFOSI agents who had seen the items *in the front room area of [appellant's] apartment*. Officer Warner typed the specific items on the warrant form for the magistrate to sign. In doing so he was requesting to search the apartment for *only those items*. Of course as police officers they would also be allowed to make seizures of items in plain view for which they had probable cause to believe was [sic]

> evidence of a crime. Here, the officers of the SAPD and AFOSI entered the apartment, split up and began searching the entire apartment at random for any item that they might consider to be contraband or evidence of a crime. They did not restrict themselves to the four corners of the warrant. Their search went well beyond the magistrate's order as to purpose. Also, because the items specifically set out on the warrant were viewed in the front room area of the apartment the search went beyond the magistrate's order as to area to be searched. If the items were located in this front room area the search should have begun and ended with this area of the house.

(Emphasis added.) A fair reading of these passages, together with a review of the arguments of counsel on this motion at trial, convinces us that the issue raised at trial is materially distinct from the issue being raised on appeal. The issue raised at trial was whether the searching officials exceeded the scope of the warrant by invading areas of appellant's apartment beyond which they needed to go in order to fulfill the stated purpose of the warrant. Summarized, the trial defense counsel's argument is: (1) the warrant listed *only* items located in the front room area of appellant's apartment; (2) those items should have been seized immediately; and (3) the search should have ended at that point, with the possible exception of items within "plain view" of the front room area.

The trial defense counsel's motion hinged on the premise that the items listed on the face of the warrant were limited to those items seen by the AFOSI agents in the front room area of appellant's apartment at the time of his apprehension. Were that the case, his point would be well taken. Once the items named in a search warrant have been found and seized, the authority to search terminates.

See, e.g., United States v. Feldman, 366 F.Supp. 356 (D.Haw. 1973); *United States v. Highfill,* 334 F.Supp. 700 (E.D.Ark. 1971). However, that premise was faulty. During testimony on the motion, the civilian detective who acquired the warrant testified that the items listed on the warrant, in addition to items actually seen by the AFOSI agents, included *other* items known to be missing from the Atari store as a result of the same burglary. Furthermore, as the trial counsel argued and as the evidence of record reflects, the search did *not* in fact result in the recovery of all the items listed in the warrant. Thus, the authority to search did *not* terminate after the recovery of the items in appellant's front room area. This fact, together with the trial judge's determination that the search warrant was supported by probable cause, effectively defeated this particular motion to suppress.

We are convinced, then, that the Fourth Amendment issue raised in the trial defense counsel's motion to suppress is completely distinct from the one being raised on appeal. Given the thrust of the issue raised at trial, the prosecution was able to successfully defeat the motion simply by producing the testimony of the civilian detective as to the nature of the items listed on the search warrant. On the other hand, had appellate counsel's issue been raised at trial, the prosecution would have been on notice of the need to produce evidence detailing the precise manner in which the items of military property were discovered and seized.[11] This evidence was not produced, however,

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[11] The "plain view" doctrine, with its corollary issues involving probable cause, "mere inspection", "immediate apparency", and "inadvertent discovery", has developed into a rather complex Fourth Amendment arena. *See generally Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Stanley v. Georgia,*

because that particular issue was not raised. As a result, the record of trial is devoid of the particular information which we would need in order to address the merits of appellate counsel's issue. That, in turn, is precisely the reason why such issues must be preserved at trial before they can be cognizable on appeal. Accordingly, we find the second prong of the assigned error to have been waived. R.C.M. 905(e).

Having examined the record of trial, the assignment of error, and the government's reply thereto, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

Chief Judge HODGSON and Judge SPILLMAN concur.

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394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). As a result, when a purported "plain view" seizure is challenged, resolution of the issue will ordinarily require a detailed examination of the circumstances immediately attending the seizure.

APPENDIX B

U.S. COURT OF MILITARY APPEALS

No. 64,433
ACM 27675

UNITED STATES, APPELLEE,

v.

PAUL A. THOMPSON, SENIOR AIRMAN,
U.S. AIR FORCE, APPELLANT

Argued March 12, 1991.
Decided Sept. 18, 1991.

Accused, senior airman in United States Air Force, was convicted by general court-martial, Mark A. Breidenbach and Stark O. Sanders, JJ., of larceny, wrongful sale of military property, arson, and housebreaking, and he appealed. The United States Air Force Court of Military Review, 96 M.J. 570, affirmed. Review was granted. The United States Court of Military Appeals, Everett, Senior Judge, held that agents of Air Force Office of Special Investigations, who had been conducting long-running investigation of accused for his suspected involvement in theft of military and civilian equipment, did not violate Posse Comitatus Act when they accompanied civilian authorities in search of accused's off-base apartment pursuant to civilian warrant for seizure of civilian property.

Affirmed.

For Appellant: *Captain David D. Jividen* (argued); *Lieutenant Colonel Jeffrey R. Owens* (on brief); *Colonel Richard F. O'Hair, Captain Mark R. Land; Captain Dawn R. Bates* (legal intern).

For Appellee: *Captain Morris D. Davis* (argued); *Lieutenant Colonel Brenda J. Hollis* (on brief); *Major Paul H. Blackwell, Jr.*

Opinion of the Court

EVERETT, Senior Judge:

Notwithstanding not-guilty pleas, a general court-martial with members convicted appellant of larceny (2 specifications), wrongful sale of military property, arson, and house-breaking, in violation of Articles 121, 108, 126, and 180, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 908, 926, and 930, respectively. The court members sentenced appellant to a dishonorable discharge, confinement for 10 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, with a minor modification to one larceny specification; and the Court of Military Review affirmed. 30 MJ 570 (1990).

On appellant's petition, we granted review of two issues questioning whether a search of appellant's off-base apartment by agents of the Air Force Office of Special Investigations (OSI) and seizure of military property during that search violated the Posse Comitatus Act (18 U.S.C. § 1385) or the Fourth Amendment to the Constitution of the United States.[1] Under the facts of this case, we conclude that the agents did not run afoul of either provision; so we affirm.

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[1] Thompson made timely trial motions that served these grounds of appeal.

I

A.

The pertinent facts were set out in the decision below as follows:

> Appellant was a suspect in the theft of computer equipment from Wilford Hall Medical Center and the burglary/arson of an Atari computer store in the civilian community. As a result, agents of the Air Force Office of Special Investigations (AFOSI) and local arson detectives embarked on a cooperative effort to investigate appellant for these offenses. On 20 October 1988, Agent Adams, an AFOSI agent acting in an undercover role, went to an informant's residence where appellant sold him several pieces of computer equipment suspected to be items missing from Wilford Hall.
>
> On 26 October, Agent Adams and an AFOSI computer specialist, Agent Forche, again acting in an undercover capacity, arranged to meet appellant at his residence for the purpose of possibly buying additional equipment. Their plan was to observe any other stolen computer equipment in appellant's residence, to possibly make another "buy" of such equipment, and to signal other agents at the appropriate time to apprehend appellant. Although no purchase took place on that occasion, Agent Adams did activate an electronic device which signalled a third AFOSI agent to come to the door and apprehend appellant, which he did.
>
> Immediately after appellant's apprehension, Agents Adams and Forche briefed a local arson detective on the various items of computer equipment which they had observed in appellant's residence and

> which matched the description of equipment missing from the Atari computer store. Based on this information, the arson detective secured a search warrant from a municipal court magistrate. The warrant was executed that same evening by three members of the local police department and four AFOSI agents. The local police seized various items of computer equipment associated with the Atari store as well as several "tools" believed to have been used to effect the burglary. The AFOSI agents, in the course of their participation in the search, came across and seized some computer equipment and various other items believed to be government property.

30 MJ at 571-72 (footnotes omitted).

B

The Posse Comitatus Act, 18 USC § 1385, prescribes:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Appellant complains that the OSI investigators here violated this constraint—that is, that they acted to execute the laws of Texas—when they searched appellant's off-base apartment, reported their findings to a civilian detective who then used that information to obtain a civilian search warrant; accompanied the detective and other civilian authorities when the warrant was executed; and themselves seized government property found during the search. Instead, we conclude that appellant has misread this statute and related provisions of law.

C

The Posse Comitatus Act is a century old law that was passed to prevent the then-common use of military forces to help civilian authorities enforce civil laws.[2] Three years ago, Congress addressed the intent behind the Posse Comitatus Act and considered its relevance to the modern-day struggle against the smuggling of illegal drugs into the United States. Whether to clarify the Posse Comitatus Act or to amend it, 10 USC § 375 provides:

> The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that the provision of any support . . . to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search and seizure, an arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

Pursuant to this mandate, the Secretary of Defense promulgated implementing regulations in Part 218 of Title 32, Code of Federal Regulations. While one section of these regulations does prohibit direct participation by military personnel in searches and seizures as assistance to civilian officials, *see* 32 C.F.R. § 213.10(a)(3)(ii),[3] the preceding section speaks to *permissible* direct assistance:

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[2] Some of the history of this Act is discussed in Siemer and Effron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act,* 54 St. John's L. Rev. 1, 18-43 (Fall 1979).

[3] In full, this section provides:

> (3) *Restrictions on direct assistance.* Except as otherwise provided in this enclosure, the prohibition on use of military person-

The following activities are not restricted by the Posse Comitatus Act . . . notwithstanding direct assistance to civilian law enforcement officials.

(i) Actions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States, regardless of incidental benefits to civilian authorities . . . This provision must be used with caution, and does not include actions taken for the primary purpose of aiding civilian law enforcement officials or otherwise serving as a subterfuge to avoid the restrictions of the Posse Comitatus Act. Actions under this provision may include the following, depending on the nature of the DoD interest and the specific action in question:

(A) Actions related to enforcement of the Uniform Code of Military Justice (10 U.S.C. Chapter 47).

* * * * *

(C) Actions related to the commander's inherent authority to maintain law and order on a military installation or facility.

* * * * *

(E) Protection of DoD personnel, DoD equipment, and official guests of the Department of Defense.

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nel "as a posse comitatus or otherwise to execute the laws" prohibits the following forms of direct assistance:

(i) Interdiction of a vehicle, vessel, aircraft or other similar activity.

(ii) A search or seizure.

(iii) An arrest, stop and frisk, or similar activity.

(iv) Use of military personnel for surveillance or pursuant of individuals, or as informants, undercover agents, investigators, or interrogators.

(F) Such other actions that are undertaken primarily for a military or foreign affairs purpose.

32 C.F.R. § 218.10(a)(2).

Thus, the relevant question upon which resolution of appellant's complaint depends is: What was "the primary purpose of" the OSI agents' involvement in the search and seizure at appellant's off-base apartment? Specifically, was their "primary purpose" to enforce the Uniform Code of Military Justice, to protect military equipment, or to achieve either of the less specific military-focused goals referred to in the negotiations between the police agencies; or was it, instead, to aid civilian law enforcement officials or otherwise to serve as a subterfuge to evade the Posse Comitatus Act?

Under the facts of this case, we believe that the answer is clear. OSI agents were deeply involved in their own investigation—which included *both* on-base thefts of military property and off-base thefts of civilian property and related offenses; and they were involved well *before* the complained of search. It is true that the civilian warrant was for seizure of civilian property and that it was obtained by civilian agents for that purpose. Nonetheless, as the Court of Military Review noted, the military had concurrent jurisdiction over the crimes committed in the civilian community, *see Solorio v. United States,* 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), so it was entirely logical for the military agents to accompany the civilian police when the latter executed their warrant to search for the fruits of the civilian thefts.

The evidence leaves no doubt that the military agents had conducted a long-running military investigation of Thompson for the thefts of *both* the military and the civilian equipment. The coincidence of the civilian investigation into the *civilian* thefts and the military agents' co-

operation with the civilian police, for their mutual benefit, in *that part* of the military investigation does not transform the "primary purpose" of the military activity into anything but what it had been all along: An effort to enforce the Uniform Code of Military Justice—an effort that, tellingly, resulted in a court-martial for *all* of appellant's offenses, rather than a civilian criminal trial.[4]

D

A final caveat is in order. By our holding, we do not imply that the evidence would be inadmissible even if a violation of the Posse Comitatus Act or the Secretary's regulation had occurred. Invocation of the exclusionary rule for Fourth Amendment violations does not necessarily imply that a statutory or regulatory violation requires similar treatment. *Cf. United States v. Caceres,* 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); *United States v. McGraner,* 13 MJ 408 (CMA 1982).

II

Appellant's Fourth Amendment objection actually is a twofold complaint, each to some degree related to his Possee Comitatus Act theory.

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[4] We acknowledge appellant's implied argument that the mere fact that the suspected crime is proscribed by the Uniform Code of Military Justice does not preclude violation of the Posse Comitatus Act. If the facts of a particular case indicate that the "primary purpose" of military investigators was to aid civilian law enforcement, then such a subterfuge of the Posse Comitatus Act will not be countenanced. *See* 32 C.F.R. § 213.10(a)(2)(i). Those, however, are not the facts of this case. Indeed, in the context of the full picture of the development of this investigation and considering its ultimate resolution—a court-martial for *all* known offenses—the investigation might fairly be characterized as one in which the *civilian* authorities aided the *military* agents, rather than vice versa.

A

Appellant argues that the OSI agents used their so-called joint investigation—which appellant contends violated the Posse Comitatus Act—to evade the Fourth Amendment barrier to the agents' entering his apartment. He points to the fact that the OSI agents had been advised before the questioned search that they lacked probable cause to search appellant's apartment for fruits of the suspected thefts of military equipment. From this, he argues that the agents' unlawful accompaniment of their civilian colleagues in the search of his apartment in violation of the Posse Comitatus Act—an intrusion in which the OSI agents were looking for the military property, not just the civilian property upon which the warrant was based—eviscerated appellant's Fourth Amendment right that the intrusion be based upon a probable-cause determination.

While there are other conceptual notions underlying this theory that must be addressed, *infra,* essentially this aspect of appellant's Fourth Amendment argument relies upon the hypothesis that the OSI agents' entry violated the Posse Comitatus Act—a hypothesis which we already have rejected. Without this premise, the logic leading to his conclusion is infirm.

B

Appellant submits that the real purpose of the OSI agents in the intrusion was to search for the military property that was outside the scope of the warrant upon which the intrusion was based. Reduced to its essential components, appellant's argument quite clearly fails.

First, the intrusion by the civilian police was pursuant to a lawfully issued warrant in a good-faith search for the fruits of the civilian thefts.

Second, in light of the ongoing military investigation into these same thefts and the concurrent jurisdiction over those crimes, this lawful intrusion did not mystically become unlawful just because the civilian officers invited the military agents along. *See United States v. Washington,* 782 F.2d 807, 813, and 816 (9th Cir. 1986); *United States v. Wright,* 667 F.2d 793, 796-97 (9th Cir. 1982). Other than his unpersuasive reasoning related to the Posse Comitatus Act, appellant has cited us to no contrary authority, and we know of none. As the Court of Military Review correctly reasoned:

> As noted above, we see no "posse comitatus" problem and, from a Fourth Amendment standpoint, appellant's privacy interests had already been effectively dissolved by the duly issued search warrant; the addition of the AFOSI agents to the search "team" did not, in and of itself, represent any significant addition intrusion upon appellant's privacy. Further, our review of the circumstances convinces us that the civilian search was a serious investigative action conducted in good faith and not simply a "subterfuge" or "pretext" search fabricated to mask the AFOSI agents' lack of probable cause to search for military property.

30 MJ at 574.

Third, while lawfully on the premises, the OSI agents were not required to close their eyes to any of the *military* property that they saw in plain view in the course of a search for the *civilian* property. *See Horton v. California,* ____ U.S. ____, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *Coolidge v. New Hampshire,* 483 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). While the scope of a search must be limited to the confines of the warrant, other evidence that is found during a property confined search need not

be ignored. *See Arizona v. Hicks,* 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *United States v. Jacobs,* 31 MJ 138, 145, 147-49 (CMA 1991) (Everett, C.J., dissenting). The mere fact that one or more of the searching officers might have hoped for just such an eventuality[5] is not of decisional importance. *Horton v. California, supra.*

To summarize, these fundamental, critical factors underpin our rejection of this aspect of appellant's Fourth Amendment claim: First, all officials were lawfully on the premises. Second, all were engaged in a good-faith search for the civilian property listed on the warrant, over which there was concurrent jurisdiction and in which there was mutual interest. *Compare United States v. Sanchez,* 509 F.2d 886 (6th Cir. 1975) (intrusion by federal agent at invitation of state agents to help execute state search warrant unlawful where federal agent had no interest in property listed in state warrant), *with United States v. Hare,* 589 F.2d 1291, 1296 (6th Cir. 1979) (where federal Alcohol, Tobacco, and Firearms (ATF) agents entered premises in legitimate, probable-cause search for weapons pursuant to lawful warrant, entry at same time by Drug Enforcement Administration (DEA) agents at invitation of ATF agents to search for drugs, without probable cause, lawful because search for weapons not "a pretense fabricated to mask the DEA's lack of probable cause"). *See also* 2 W. LaFave, *Search and Seizure,* § 4.1(e) at 357 n.91 (2d ed.1987). Finally, there is no evidence that the physical scope of the search exceeded the limits of the warrant.[6]

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[5] This was raised during testimony of one witness during the investigation under Article 32, Uniform Code of Military Justice, 10 USC § 832, but was never asserted during any testimony at trial, so it cannot be considered. *United States v. Bethea,* 22 USCMA, 223, 46 CMR 223 (1973).

[6] The record reflects that the searching officers did not find all of the civilian property listed in the warrant in appellant's living room—

III

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judge COX concur.

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the first room they entered—so the search continued beyond the living room to the rest of the apartment. Thus, a reasonable inference from this testimony—in the absence of utterly any indication to the contrary—is that the military property, which was located in areas other than the living room, was found in plain view during the lawful search under the civilian warrant.

Although we do not rely upon waiver to resolve this particular aspect of the Fourth Amendment issue, as did the Court of Military Review, *see* 30 MJ 570, 575-76 (1990), we do note that defense counsel's motion at trial was a bit ill-defined as to this ground. *See* Mil.R.Evid. 311(d)(2)(A), (d)(3), and (e)(3), Manual for Courts-Martial, United States, 1984. A more precise objection—if, indeed, defense counsel did have such an objection—logically wound have led to a fuller development of the facts affecting this issue. Accordingly, we are more inclined than we otherwise might be to find that, based on the evidence just mentioned and the reasonable inferences drawn therefrom, the Government carried its burden of proving by a preponderance of the evidence that the challenged evidence was lawfully discovered, *see* Mil.R.Evid. 311(e)(1).

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